(4)

No. 99-1172

Supreme Court, U.S.
FILED
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IN THE

# Supreme Court of the United States

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit corporation,

*Petitioner*,

—v.—

CITY OF CHICAGO,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## REPLY BRIEF FOR THE PETITIONER

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The City of Chicago ("the City") argues that review should be denied because: (1) Petitioner's claim regarding a circuit split is premature; (2) a 1998 settlement between cigarette manufacturers and 46 States has rendered the question presented moot and/or insignificant; (3) the decision below is interlocutory; and (4) the decision below is correct. The City's arguments should be rejected and *certiorari* should be granted.

1. The City does not and cannot dispute that the Seventh Circuit's opinion in this case (as well as the Fourth Circuit's opinion in *Penn Advertising, Inc.* v. *Mayor and City Council*[1] and the Second Circuit's opinion in *Greater New York Metropolitan Food Council, Inc.* v. *Giuliani*[2]) directly conflicts with the Ninth Circuit's ruling in *Lindsey* v. *Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999). Nor does the City deny that the very fact of the resulting circuit split concerning the scope of federal preemption under the Federal Cigarette Labeling and Advertising Act ("FCLAA") undermines the policy of FCLAA of preventing "diverse, nonuniform, and confusing" cigarette "advertising regulations." 15 U.S.C. § 1331(2) (1994).

The City argues, however, that Petitioner's claim of conflict is premature in light of the Ninth Circuit's request for briefing on whether *Lindsey* should be reheard *en banc*. (Brief for Respondent in Opposition ("Resp. Opp. Br.") at 7-9) At most, the Ninth Circuit's request for briefing on that issue suggests that this Court should defer consideration of the petition until the Ninth Circuit has decided whether to rehear *Lindsey*. Petitioner, in fact, suggested such deferral to the Court by letter of February 17, 2000.

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[1] 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

[2] 195 F.3d 100 (2d Cir. 1999), *petition for certiorari filed*, 68 U.S.L.W. 3480 (Jan. 12, 2000) (No. 99-1171).

In the event that the Ninth Circuit determines not to rehear *Lindsey*, the seriousness of the circuit conflict will not be diminished (*see* Resp. Opp. Br. at 9) by the fact that the defendants in that case have agreed not to seek further review of the Ninth Circuit's decision. Like any other decision by a losing party not to seek further review, the *Lindsey* defendants' decision will leave *Lindsey* in place as the law of the circuit, law in direct conflict with the decisions of three other federal courts of appeal.[3]

2. The City argues that a 1998 settlement agreement between several cigarette manufacturers and 46 States (the "Settlement Agreement") renders this case moot and/or has "greatly reduced if not eliminated" the practical significance of the question presented by this case. (Resp. Opp. Br. at 9-10) The City raised the same issue below, but the Seventh Circuit denied the City's request for a hearing on the issue.[4] The Settlement Agreement does not diminish the importance of this case at all.

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[3] In its *amicus* brief supporting rehearing in *Lindsey*, the United States urged the court "to address the direct Circuit split created by the panel . . . with regard to an important federal statutory scheme in the context of an issue of public concern." Brief of the United States as *Amicus Curiae* Regarding Rehearing *En Banc* at 16. That—and the fact that the Seventh and Second Circuits disregarded this Court's controlling decision in *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992)—is precisely why *certiorari* in this case and *Greater New York Metropolitan Food Council*, No. 99-1171, is warranted. That 19 States have also filed an *amici* brief urging the Ninth Circuit to rehear *Lindsey* because of the national importance of the decision further undermines the City's contention that the instant case is unworthy of this Court's review.

[4] *See* Motion for Remand to District Court for a Hearing Vacating Injunction on Grounds of Mootness and to Hold Briefing in Abeyance Pending a Decision on This Motion and December 21, 1998 Opinion Denying the motion, attached hereto as App. 1a-10a.

Neither Petitioner nor its members are parties to the Settlement Agreement, which binds only the cigarette manufacturers that have signed it. While under the Settlement Agreement, these manufacturers have agreed to certain restrictions on outdoor cigarette advertising, the Settlement Agreement does not affect the ability of retailers or non-signatory manufacturers to advertise cigarettes outdoors in any way. Nor does the Settlement Agreement preclude the signatory manufacturers themselves from displaying outdoor advertising on the premises of retail establishments. In short, the right of Petitioner's members to sell cigarette outdoor space—to both signatories and non-signatories of the Settlement Agreement—is very much still at stake in this case. As such, it is clearly not moot. *See Powell* v. *McCormack*, 395 U.S. 486, 496 (1969) ("a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome").

3. The City's argument that this case is inappropriate for plenary review because the decision below is interlocutory (Resp. Opp. Br. at 11) is equally misconceived. To allow the boundaries of the preemptive scope of the FCLAA to remain unsettled for a period of what may well be years—in the face of an immediate circuit conflict—while other issues are tried and appealed would only delay resolution of a significant legal issue that should best be resolved now. *See Geissal v. Moore Medical Corp.*, 524 U.S. 74, 79 (1998); *United States v. General Motors Corp.*, 323 U.S. 373, 374-377 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916); *Forsyth v. Hammond*, 166 U.S. 506, 514 (1896); Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, SUPREME COURT PRACTICE 226 (6th ed. 1986) (even though other issues remained to be decided below, the Court has granted *certiorari* where there was a conflict on a question of law with another court of appeals which would justify review of a final decree or

judgment); *see also id.* (*certiorari* granted where nonfinal judgment presented "a novel and important question of law and where petitioner's position, if sustained, would render the decision wholly void"). The need to resolve the conflict among the circuits on this important question of federal law is both immediate and urgent.

Moreover, a large number of local jurisdictions have adopted ordinances banning or restricting outdoor cigarette advertising in the past several years. These measures have spawned a large amount of litigation.[5] This multiplicity of local regulations and conflicting court decisions determining their validity or invalidity is precisely the "diverse, confusing, and nonuniform" result that Congress sought to avoid in passing the FCLAA. *See* 15 U.S.C. § 1331(2) (1994). States and local governments adopting such regulations and the advertisers of cigarettes affected by them are in need of guidance from the Court.

4. The City fails to justify the Seventh Circuit's refusal to "give effect to [the] plain language" of FCLAA § 1334(b) in this case. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). This Court, stating that Section 1334(b) "provides a reliable indicium of congressional intent with respect to state authority," *id.* at 517, stressed that the task in determining the scope of FCLAA preemp-

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[5] In addition to *Penn Advertising*, *Greater New York Metropolitan Food Council*, *Lindsey*, and this case, there have been numerous district court cases that have ruled on the application of FCLAA preemption to local laws regulating cigarette advertising. *See, e.g.*, *Rockwood* v. *City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding that ordinance regulating outdoor cigarette advertising is preempted by FCLAA); *Chiglo* v. *City of Preston*, 909 F. Supp. 675 (D. Minn. 1995) (same); *Lorillard Tobacco Co.* v. *Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999) *appeal pending*, No. 00-1117 (1st Cir. 2000) (rejecting FCLAA preemption challenge to law regulating outdoor cigarette advertising).

tion is to construe "the precise language" of Section 1334(b). *Id.* at 523. The Court described this task as "straightforward," *id.* at 524, concluding that there is "no 'good reason to believe' that Congress meant less than what it said" in the plain language of Section 1334(b). *Id.* at 522 (citation omitted).

The Seventh Circuit, however, in effect determined that *Cipollone* is no longer good law and that the preemptive effect of FCLAA should be considered in light of subsequent decisions by this Court involving other statutes. *See* Petition for Certiorari, Appendix ("Pet. App.") 5a-7a; *but see Agostini v. Felton,* 521 U.S. 203, 237 (1997) (rejecting the proposition "that other courts should conclude that our more recent cases have, by implication, overruled an earlier precedent").[6] The court thus dismissed the language of Section 1334(b) as " 'unhelpful,' " Pet. App. 6a (citation omitted), and read into the provision a "zoning" exception to preemption allowing state and local governments to ban cigarette advertising. Such an exception is incompatible with "the plain language" of Section 1334(b) and entirely different from the types of regulations that Congress indicated Section 1334(b) does *not* preempt—regulations that do *not* target cigarette advertising based on concerns about smoking and health. *See* S. Rep. No. 566, 91st Cong., 2d Sess. 12 (1969). The exception created by the Seventh Circuit would eviscerate Section 1334(b)'s express command that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of . . . cigarettes."

Nor is there any merit to the City's argument that the Ordinance is not "based on smoking and health" because it

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[6] A concurring opinion in *Lindsey* by Judge O'Scannlain, issued after the filing of the petition in this case, relating to this subject is annexed hereto as App. 11a-13a.

serves "broader interests," such as discouraging illegal tobacco sales to minors. (Resp. Opp. Br. at 14) The District Court rejected this defense of the Ordinance in scathing terms, *see* Pet. App. 23a-30a, noting that tobacco sales to minors were made illegal in the first instance precisely because of concerns about smoking and health. Pet. App. 29a-30a. The Seventh Circuit did not disagree with the District Court's conclusion in this regard[7] but instead treated the purpose of the Ordinance as irrelevant—despite Section 1334(b)'s injunction against state and local requirements or prohibitions "based on smoking and health." In this respect, as in others, the Seventh Circuit disregarded the plain language of Section 1334(b) and the teaching of *Cipollone*, as well as this Court's direction that preemption analysis should take into consideration both the purpose and effect of a challenged measure. *See Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 105-06 (1992).[8]

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[7] Likewise, the Second Circuit in *Greater New York Metropolitan Food Council* also found the New York ordinance at issue in that case to be "based on smoking and health" because its purpose and effect was to promote health goals. *See* Pet. App. 54a-55a.

[8] This Court in *Cipollone* noted that Congress fashioned Section 1334(b) in its current form in 1969 in response to actions the states were preparing to take to regulate cigarette advertising, including proposed California legislation to ban cigarette advertising. 505 U.S. at 515 & n.11; *see id.* at 539 (separate opinion of Blackmun, J., joined by Kennedy & Souter, JJ.) (Section 1334(b) bars states from banning cigarette advertising).

## CONCLUSION

For the reasons stated above and for those set forth in our petition, it is respectfully submitted that the petition for a writ of *certiorari* should be granted.

Dated: New York, New York
February 22, 2000

Respectfully submitted,

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